United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4043

United States Court of Appeals

FOR THE SECOND CIRCUIT

PITTSTON STEVEDORING CORPORATION,

Petitioner,

—v.—

JOHN SCAFFIDI,

Claimant-Respondent,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party in Interest-Respondent.

B
P/S

BRIEF FOR RESPONDENT, JOHN SCAFFIDI

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BRIEF FOR RESPONDENT, JOHN SCAFFIDI

Statement

Respondent, John Scaffidi, hereinafter referred to as the claimant, agrees with the statement as made by the Petitioner. However, the Petitioner has failed to indicate all of the parties who appeared before the U. S. Department of Labor, Office of Workers' Compensation Programs, hereinafter referred to as O.W.C.P., the Administrative Law Judge, hereinafter referred to as ALJ, and the Benefits Review Board, hereinafter referred to as the BRB or the Board. The caption of this case before the administrative agencies is:

"JOHN SCAFFIDI, Claimant,

v.

PITTSTON STEVEDORING CORPORATION, Employer

and

GULF INSURANCE COMPANY, Carrier

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Party in Interest"

In all of the proceedings before the O.W.C.P. and the ALJ, the employer and carrier were represented by DiCostanzo, Klonsky and Cutrona, P.C. The employer, Pittston Stevedoring Corporation, appealed the decision of the ALJ to the BRB and engaged Joseph F. Manes, Esq. to represent it. The carrier, Gulf Insurance Company, did not appeal the decision of the ALJ and paid to the claimant the award made by the ALJ.

The employer apparently reframed the caption of this case both before the BRB as well as the Circuit Court by omitting therefrom the Gulf Insurance Company as well as the Director, Office of Workers' Compensation Programs. This omission and the failure to reveal to the Court the fact that the Gulf Insurance Company paid the award to the claimant, raises an additional issue on this appeal as stated below.

Issues Presented

Respondent, John Scaffidi agrees with issues #1 & #2 as presented by Petitioner.

The third issue is whether the Petitioner has the legal right to appeal to this Court on a moot question.

Counterstatement of Facts

The claimant is a longshoreman by trade (14a-15a) and has been employed generally on ships, docks and piers for this employer for the past 25 years (15a). Work on the dock is known as terminal labor (15a-16a). When the claimant does driving for the employer, he uses special equipment in the handling of cargo such as fork lifts, hustlers, stackers, etc. All of the latter are special types of equipment used in the loading and unloading of ship's cargo (15a, 17a, 18a, 21a).

The claimant considers himself to be a longshoreman (14a, 15a). He is a member of the International Longshoremen's Association (19a). The claimant has an identification card issued by the Waterfront Commission of New York and New Jersey. This Commission controls all of the manual labor that is done on the piers (19a, 20a) and ships.

The loading procedure is as follows:

> Truckmen arrive at the employer's pier with a shipper's cargo. Longshoremen unload the truck. The cargo is temporarily stowed on the pier until all cargo is received that has been scheduled to go aboard a certain ship. The arrival of cargo is scheduled about five to fifteen days prior to the arrival of the vessel. In the event that cargo is received too early or too late, there is a penalty in the form of a demurrage charge. This charge is levied to prevent the pier from being overloaded (22a-23a, 59a-60a).

On the day of the accident, March 12, 1973, the claimant was assigned to move cargo from Columbia Street pier to

Pier #12 so that it could be loaded on a ship (24a). Cargo that had been delivered to the Columbia Street Pier had to be taken to Pier #12. This movement was required because the Philippine Line had moved its shipping operations from Columbia Street to Pier #12 (24a-25a). The entire area from Columbia Street to Pier #12, Brooklyn, is known as a waterfront area, Buttermilk Channel (24a), customarily used for the loading and unloading of vessels.

It was stipulated that the employer operated Pier #12, which is adjacent to navigable waters of the United States (24a). The claimant drove a tractor and boogie (chassis) that had a container on it. Part of the contents of this container had to be loaded on a vessel. This vessel was docked at Pier #12 on the day of the accident, and was in the process of being loaded by the employer's longshoremen (25a). The claimant was injured when struck by a case that fell after he opened the container door within the marine terminal maintained by the employer (43a).

The employer produced a witness, Mr. D'Allessandro, and he confirmed that the claimant's duties involved driving equipment pertaining to the loading of ships (46a, 48a, 49a).

The employer conceded that checkers are covered under the Act and that checkers works alongside of the claimant when the container is unloaded (49a-50a).

It is the sole business of the employer to load and unload ships and that every step that is taken after cargo is received from a shipper is an integral part and parcel of the loading of a vessel (59a and 60a).

The Petitioner at page one of its brief under "Statement" relates to an appeal from a decision of an Admin-

istrative Law Judge dated April 29, 1975 (6a-10a), but did not state that this order was affirmed on appeal by the Benefits Review Board (2a-5a) decision dated December 8, 1975. The Petitioner's caption does not conform with the caption of this case as it appeared before the O.W.C.P. and ALJ. The Gulf Insurance Company was a named party to the proceedings before the O.W.C.P. and ALJ. The omission of the Gulf Insurance Company from the proceedings herein is highly significant in that the Gulf Insurance Company refused (in writing) to appeal the decision of the ALJ, did not hire Mr. Joseph F. Manes, the attorney for Pittston Stevedoring Corporation, and has paid the award made by the ALJ in full. Since the compensation carrier stands in the place of the employer and is monetarily liable for all compensation benefits, it raises an additional issue on appeal not presented to the BRB.

At all times prior to the appeal before the BRB, the Pittston Stevedoring Corporation and the Gulf Insurance Company, both were represented by Philip F. DiCostanzo (DiCostanzo, Klonsky & Cutrona, Esqs.).

Since a motion has been granted to have oral argument in this case together with Case Nos. 95-4249 and 74-4009 and briefs will be filed in said cases, the claimant will only make brief argument on the jurisdictional issue, but a more detailed presentation on the issue of constitutionality and whether the Pittston Stevedoring Corporation presents a moot issue on appeal to this Court.

Statutes Involved

On the issue of jurisdiction and parties in interest, the principal statutes involved are 33 U.S.C. 901 et seq. especially 902(3)(4), 903(a), 920(a)(b), 921(b)(3), 935.

Argument

The argument as stated in the brief of Respondent, Carmelo Blundo (case #75-4249) on the issue of jurisdiction equally applies in this case and said points are summarized as follows:

I. 33 U.S.C. 920 creates presumption in favor of the claimant. Doubts, including factual are to be resolved in favor of the claimant, *Friend* v. *Britton*, 220 F.2d 820 (D.C. Cir. 1955); *Beasley* v. *O'Hearne*, 250 Fed. Supp. 49 (S.D. W. Va. 1966).

II. The construction of a statute by an agency charged with its enforcement is entitled to great weight, *NLRB* v. *Boeing*, 412 U.S. 67 (1973); *Brennan* v. *Prince William Hospital*, 503 F.2d 282 (4th Cir. 1974); *Nacirema Operating Co.* v. *Oosting*, 456 F.2d 956 (4th Cir. 1972). All the latter cases hold that while the interpretation of an administrative agency is not binding on the courts, it is nevertheless entitled to great weight.

III. 33 U.S.C. 921(b)(3) provides that findings of fact by the Board shall be considered conclusive if supported by substantial evidence in the record considered as a whole, *O'Keefe* v. *Smith, Hinchman & Grylls Assoc., Inc.*, 380 U.S. 359 (1965); *Wheatly* v. *Adler*, 407 F.2d 307 (D.C. Cir. 1968); *Potenza* v. *United Terminals, Inc.*, —— F.2d —— (2d Cir.

1975); *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947); *Wolf* v. *Britton*, 329 F.2d 181 (D.C. Cir. 1964).

IV. The Pittston Stevedoring Corporation is not in the warehousing and/or storage business at Columbia Street Pier, Brooklyn, or Pier #12. Its sole business is to load and unload ships as per the counterstatement of facts *supra*. The Amended Act specifically intended checkers to be covered within its new definitions 33 U.S.C. 902(3), (4), 903(a) as per House of Representatives Committee Report #92-1441 where it is stated at page 11 that . . . "However checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. . . . " The statement of facts recited above indicated that the claimant must work alongside of a checker in unloading a container, therefore, the employee doing the manual labor is also by inference covered. Harsh and incongruous results are to be avoided and the Act is to be liberally construed in favor of the claimant, *Reed* v. *SS Yaka*, 373 U.S. 410 (1964); *Michigan Mutual Liability Co.* v. *Arrien*, 34 F.2d 640 (1965). This Court is urged to reject the point of rest theory maintained by the employer in the *I.T.O.* v. *Adkins* case, —— F.2d —— (4th Cir. 1975). Said case was a two to one decision with a strong dissent written by Judge Craven. Re-argument en banc has been granted in said circuit. The *Weyerhauser* v. *Gilmore*, 9th Cir. decided December 5, 1975 does not involve a checker or longshoreman and is therefore distinguishable on its facts.

V. Where the language of the statute is clear, there is no need for the court to provide guidelines, *U.S.* v. *Hunter*, 318 F.2d 563 (3rd Cir. 1963); *Spann* v. *Lauretzen*, 338 F.2d

VI. Until a container is unloaded and the cargo is delivered to the consignees' truckman, it is in maritime commerce and conversely until cargo received by a stevedoring company is loaded on a vessel the maritime nature of the employment under the Act in connection therewith is not terminated, *Haggans* v. *Ellerman & Buchnall SS Co.*, 318 F.2d 563 (3 Cir. 1963); *Spann* v. *Lauritzen*, 338 F.2d 205 (3rd Cir. 1965); *Litwinowicz* v. *Weyerhauser SS Co.*, 179 F. Supp. 812 (E.D. Pa. 1959). In the latter case the court held that the term "loading" is not a word of art and not to be narrowly and hypertechnically interpreted.

VII. The finding of fact by the ALJ and affirmed by the BRB (2a-10a) that the claimant was performing an integral part of the loading of a ship when injured is supported by substantial evidence and therefore binding on this Court, 33 U.S.C. 921(b)(3); *O'Leary* v. *Puget Sound Bridge & D.D. Co.*, 349 F.2d 571 (9th Cir. 1965); *O'Keefe* v. *Smith Assoc.*, 380 U.S. 359.

VIII. The employer failed to rebut the presumption of jurisdiction under 33 U.S.C. 920; *Butler* v. *District Mfg. Co.*, 363 F.2d 682 (D.C. Cir. 1966); *John W. McGrath Corp.* v. *Hughes*, 264 F.2d 314 (2nd Cir. 1959); *Steele* v. *Adler*, 269 Fed. Supp. 376 (D.D.C.). The burden of disproving a claim is on the employer, *Strachen Shipping Co.* v. *Shea*, 406 F.2d 521 (5th Cir. 1969).

POINT IX

The extension of the Act to include land based accidents is constitutional.

That Congress is empowered to revise and supplement the maritime law within the limits of its constitutional jurisdiction is beyond dispute. The only question to be considered in this case is did Congress exceed its authority by enacting 33 U.S.C. 903 by extending maritime jurisdiction to the "terminal". . . ." It has been held that the Longshoremen's and Harbor Workers' Compensation Act of 1927 is constitutional, *Crowell* v. *Benson*, 285 U.S. 22 (1932). By the amended law effective November 26, 1972, Congress has enlarged the jurisdictional concept of navigable waters to include those areas adjoining navigable waters, and used in connection with and to facilitate maritime transportation. In *Detroit Trust Co.* v. *Steamer Thomas Barlum*, 293 U.S. 21 (1934), the court said that new "conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned as for example they were abandoned in discarding the doctrine that the admiralty jurisdiction is limited to tidewaters." The Admiralty Jurisdiction Extension Act of 1948, 46 U.S.C. 740, extended to all cases of damage and injury to person or property caused by a ship notwithstanding that such damage or injury was consummated on land. Thus, it is clear that admiralty jurisdiction could extend to maritime employment on land. The BRB and the ALJ has determined that the operation of a hustler to move a container used to transport marine cargo is an essential step in the process of loading cargo

aboard a vessel (4a, 8a, 9a). This is a finding of fact, is supported by substantial evidence in the record and is therefore binding on this Court, 33 U.S. 921(b)(3) mentioned *supra*.

There have been numerous decisions which have held that the rights of seamen are available to longshoremen because the latter are doing essentially what seamen used to do before the unloading and loading of a vessel became a specialized technique and assigned to longshoremen, *Atlantic Transport Co.* v. *Imbrovek,* 234 U.S. 52 (1914). At page 62, the court said, "Formerly the work was done by the ship's crew, but owing to the exigencies of increasing commerce and demand for capability and special skill, it has become a specialized service devolving upon a class as clearly identified with maritime affairs as mariners." *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946); *Reed* v. *S.S. Yaka,* 373 U.S. 410 (1963); *Gutierrez* v. *Waterman S.S. Corp.,* 373 U.S. 206 (1963). Longshoring activities constitute a maritime employment and properly regulated by maritime law under the constitution.

Among the main purposes of enacting the law were:

1. To create a uniform compensation act and

2. To provide more adequate benefits than provided by even the most liberal of State Compensation Law, House of Representatives Report 92-1441, page 10.

Petitioner's brief relies on said House Report, *supra,* and proceeds to quote from page 11 of this report. This quotation stops short of the very next sentence which states:

> "However, checkers, for example, who are directly involved in the loading and unloading functions are covered by the new amendment."

As pointed out in the counterstatement of facts, *supra,* the employer conceded that checkers are covered under the Act, and that checkers work alongside the claimant when a container is unloaded (49a, 50a). The checker actually performs the "paper work" in that he checks the cargo being unloaded from a container and then loaded on a vessel. It would appear to be incongruous that the House Report would refer to checkers without intending that other persons doing the manual labor along with the checkers should also be included within the new provisions of the Act. Does Petitioner deny that the work of a driver is more hazardous than a checker? It appears that this is not possible in view of the reasoning presented in its brief starting at page 9. This page specifically mentions that Congress intended to cover employees who work in extremely hazardous work; for longshoring is one of the most dangerous occupations. It therefore follows (if petitioner's reasoning is carried to its logical conclusion) that if Congress intended by its specific reference to cover checkers who work on the dock, does it not follow that the workers who are actually engaged in the manual labor are also covered? To pose the question is to answer it. Nothing more need be elaborated on this point.

Even the majority opinion in the case of *I.T.O.* v. *Adkins, supra,* relied on by the Petitioners recognized that Congress could constitutionally extend maritime jurisdiction to land-based accidents under the Act. The Supreme Court also recognized this Congressional authority when it invited Congress to amend the Longshoremen's and Harbor Workers' Compensation Act if it was its intention to extend jurisdiction landward; *Nacirema Optg. Co.* v. *Johnson,* 396 U.S. 212 (1969). It cannot be said that the Supreme Court

would make a recommendation to Congress which it would strike down as unconstitutional as a matter of law.

The employer's argument would limit the applicable portion of the new amendment by reason of the point of rest theory, and the question presented is, Did Congress intend such a limitation? A complete reading of the House of Representatives Report, *supra,* indicates the contrary. A few of the following excerpts illustrate Congress' intention:

> "The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as 'unseaworthiness,' 'non-delegable duty,' or the like" (p. 6 of report).

EXTENSION OF COVERAGE TO SHORESIDE AREAS

> "The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur 'upon the navigable waters of the United States.' Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs."
>
> "It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be

a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore."

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel."

"The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity" (pp. 10-11 of report).

POINT X

The Petitioner presents a moot question to the Court.

33 U.S.C. 935 states:

> "In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the Secretary shall by regulation provide for the discharge by the carrier for such employer, of such obligations and duties of the employer in respect to such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes, (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the Board, or the Secretary, or any court under this Act shall be jurisdiction of the carrier and (3) any requirement by a deputy commissioner, the Board or the Secretary or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer."

The purpose of this statute is clear. Where the employer has proper compensation coverage then all of the duties and obligations under the Act to pay compensation and furnish medical care become the obligation of the carrier. The reason for including the carrier as a party to the proceedings was to make it subject to the orders and direction of the Deputy Commissioner, Secretary of Labor, the

appeal agencies and the courts. Surely, it was not the intention of legislature to have the claimant confronted with two parties to oppose a claim (the employer and its carrier). Assuming for argument, that this Court were to reverse the decision in favor of the claimant, it could not direct that the award be paid back to Pittston Stevedoring Corp., but only to the Gulf Insurance Company, who is not a party to this appeal. The legal redress requested by the employer is therefore moot, *ipso facto.*

CONCLUSION

The decision made by the ALJ and affirmed by the BRB should be affirmed by this Court.

The employer's appeal is denied in that it failed to name the Gulf Insurance Company as a party to the proceedings and in that it presents a moot question for decision since the Gulf Insurance Company who paid the award to this claimant has not appealed the decision of the ALJ and said insurance company has supplanted the employer under Section 935 of the Act.

Claimant's attorneys are entitled to a fee under 33 U.S.C.A. 28A, as a charge to the employer directly for services rendered in connection with this appeal.

Respectfully submitted,

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ANGELO C. GUCCIARDO
of Counsel

Dated: New York, New York
May 12, 1976

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes and says, that on the 14 day of May 19 76, at 2 o'clock P. M. he served the annexed Brief for Respondent, John Scaffidi in Re: No. 76-4043 Pittston Stevedoring Corp. v. John Scaffidi

upon William J. Kilberg

Esq(s)., Attorney(s)

for Office of Workmen's Compensation Programs

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

Solicitor of Labor
Ronald E. Meisburg, Esq.
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that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 14th day of May 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1977

Service of three (Two) (3) copies of the within BRIEF
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